

9-1-2001

## Problems with WTO Dispute Settlement

Alan Wm. Wolff

Follow this and additional works at: <https://chicagounbound.uchicago.edu/cjil>



Part of the [Law Commons](#)

---

### Recommended Citation

Wolff, Alan Wm. (2001) "Problems with WTO Dispute Settlement," *Chicago Journal of International Law*. Vol. 2: No. 2, Article 14.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol2/iss2/14>

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in Chicago Journal of International Law by an authorized editor of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# Problems with WTO Dispute Settlement

Alan Wm. Wolff\*

The open multilateral trading system that has been part of the international economic architecture of the last six decades has brought unparalleled growth and economic well-being to a larger proportion of the world than in any prior era. Those who care about preserving and enhancing this progress should be concerned about the serious systemic problems that threaten to undermine the legitimacy of the system's institutions.

One such institution—arguably the most important one—is the dispute settlement mechanism established in 1994 under the World Trade Organization (“WTO”) agreements. Claude Barfield has written a timely and important analysis of the WTO dispute settlement regime, its recent use, its shortcomings, and its possible salvation. This response follows Barfield's headings and comments on several of his major conclusions and proposals.

## I. THE NATURE OF THE PROBLEM

### A. TRADE RELATIONS AMONG NATIONS

Something has gone terribly wrong in the conduct of international trade relations. Ironically, the problem stems from a well-meaning attempt in the Uruguay Round to increase the role of the rule of law among trading nations. This development was the creation of binding dispute settlement as part of the new WTO. As with other instances in which idealism has been allowed to overwhelm more practical approaches, unintended consequences have caused what the military would call extensive collateral damage. Promising a new era of carefree, automatic resolution of differences, in reality the new system has increased animosity among the major trading nations, has brought about the imposition of trade sanctions, and threatens to further limit trade.

---

\* Managing Partner, Washington, DC Office, Dewey Ballantine LLP. The views expressed here are the author's and not necessarily those of Dewey Ballantine LLP or any of its clients.

The highest profile examples are well known. For instance, the EU brought a case against the US tax measure known as the Foreign Sales Corporation ("FSC").<sup>1</sup> It did this although there are no known trade distorting effects of this measure and despite the fact that the EU agreed to the United States putting this tax provision into place two decades ago.

In fact, the FSC addresses a defect in the General Agreement on Tariffs and Trade ("GATT")/WTO rules, which allow for border adjustment—that is, rebating on export and levying on import—only for "indirect" taxes (taxes on goods) and not for "direct" taxes (taxes on producers and other persons). There is no economic justification for this distinction, as producers will absorb some portion of indirect taxes and some portion of direct taxes will be shifted forward to purchasers.

The economic disadvantage to the United States of the GATT rules was great, as the United States, in contrast to its trading partners, does not have a value-added tax, but relies very heavily on income taxes for revenue. A negotiated settlement between the United States and the EU was necessary. This was achieved in 1981 and duly notified to the GATT. This was an example of successful trade diplomacy on an issue that had been debated and left unresolved throughout the 1960s and 1970s.

Why then did the EU bring the FSC case? Solely because binding dispute settlement had given the United States two supposedly unrelated wins against the EU and a right of retaliation against European products, which the United States exercised. These two major cases stimulated the European response. One involved a longstanding fight over whether Europe could, without scientific evidence showing any hazard to health, ban imports of US beef raised with the assistance of hormones.<sup>2</sup> The United States clearly had a meritorious WTO case against the EU, pressed it, and achieved a legal, if hollow, victory. The EU had repeatedly informed the United States that the beef issue posed a domestic political problem that it could not solve. It remained steadfast—obstinate, in the US view—and the United States imposed trade sanctions. In practical terms, neither side has won. No US beef that was the subject of the case has been allowed into the EU, and there is a range of agricultural products barred entry into the United States as retaliation. The other great foray by America into trade litigation that brought about the FSC case involved EU discrimination

- 
1. World Trade Organization, Report of the Panel, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/R (Oct 8, 1998). Legislation enacted in the wake of this adverse decision has been challenged by the EU as inadequate and is now before a compliance panel under DSU Art 21.5. See World Trade Organization, *United States—Tax Treatment for "Foreign Sales Corporations"—Understanding between the European Communities and the United States Regarding Procedures under Article 21 and 22 of the DSU and Article 4 of the SCM Agreement,* WT/DS108/12 (Oct 5, 2000).
  2. World Trade Organization, Report of the Appellate Body, *European Communities—Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R (Jan 16, 1998).

against US banana producers.<sup>3</sup> Never mind that the United States did not actually produce within its territory the bananas involved. The story is familiar: solid WTO case; EU recalcitrance; US retaliation through trade sanctions; much anger all around. Stung, the EU looked for any case it could bring in response. The result was the FSC case. Now, having won, the EU threatens to place import restrictions on \$ 4 billion of US exports.

To round this picture out, I will describe one further case. In 1998, Japan's steel cartel, in reaction to sharply falling demand in Asia during the Asian financial crisis, inundated the US market with carbon flat-rolled steel. It did so with the approval of the Japanese government. From a relatively modest level of shipments of less than 50,000 tons per month, Japan moved to flood the US market with 2.2 million tons of dumped steel in a period of just seven months. The US producers were driven into the red. Some went bankrupt, even though US demand for steel was at all-time record levels. What Japan had done, in order to maintain production and employment at home, was to engage in one of the most callous acts of trade aggression in the entire post-World War II period. Now, in this distorted world of binding WTO dispute settlement, which country sued the other? Japan, of course, sued the United States. It did so over the US use of antidumping measures—the remedy approved by the WTO rules.<sup>4</sup> If there were an award given for cheekiness in the trade arena, Japan clearly would have no close rivals for first prize.

The WTO panel result appropriately left large US antidumping duties in place. This will prevent further Japanese dumping. But, oddly, Japan loudly trumpeted to the press that it had won the case. Why? Japan had gotten the panel to agree that some aspects of US antidumping methodology needed to be changed. There was some method to Japan's attack on the United States in the WTO: Japan sought to erode the US antidumping law one piece at a time. To do so would allow Japan to continue to run segments of its economy on mercantilist terms, preserving its cartel arrangements that require dumping of surpluses abroad. With each win, Japan's domestic restructuring can be put off and adjustment can be avoided by the stakeholders in Japan's anticompetitive market structure.

To the above list of minor calamities brought about by binding international dispute settlement should be added a fifth, wholly of US making. This is "carousel retaliation."<sup>5</sup> Trade expansion depends upon certainty. Certainty about market access underlies the ability of businesses to plan to export and import. This is why a variable

- 
3. World Trade Organization, Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept 9, 1997).
  4. World Trade Organization, Report of the Appellate Body, *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001).
  5. See § 407 of the Trade and Development Act of 2000, Pub L No 106-200, 114 Stat 251, codified at 19 USC § 2416(b)(2) (2001).

levy on agricultural imports or a first-come, first-served import quota on manufactured goods can be far more disruptive to trade than a high, fixed tariff. Understanding the disruptive nature of changes in trade barriers, Congress required that retaliation against the EU's intransigence be shifted every six months. Given that dispute settlement is binding, and that the EU had not complied with WTO panel rulings, it seemed logical to try to enforce the judgments obtained.

These cases, and their consequences, demonstrate that the conduct of international trade relations has gotten badly off track. Trade diplomacy has been sharply curtailed. Because litigation is readily available, meaningful consultations do not take place. After all, to have a full, substantive discussion of differences might well reveal litigation strategy. Consequently, exchanges between governments have become largely sterile.

## B. CONSTITUTIONAL ISSUES—THE RUNAWAY WTO SECRETARIAT

Longer term, there are even more serious questions about WTO dispute settlement. The WTO Secretariat has arrogated to itself through dispute settlement a legislative function, to fill in the gaps and clarify ambiguities in trade agreements that the nations negotiating them could not or consciously would not do. WTO dispute settlement is interfering with American and other nations' sovereignty because there has been no consent given to such settlement. Obligations are being fabricated and rights created and curtailed by those who bear no direct accountability to any WTO Member.

As members of the ad hoc dispute settlement panels serve only part time, the Secretariat is very influential. These international bureaucrats, used to supporting negotiations, are often presented with matters that cannot be resolved based on a clear reading of the agreements. Unfortunately, rather than reining in their charges, the Secretariat has helped them to write new WTO rules. The clearest, most serious example was in *UK Bar*.<sup>6</sup> This panel decision determined that privatization would in certain circumstances extinguish prior subsidies. Nowhere in the Subsidies Code can a provision addressing this issue be found. Yet a decision was reached that the United States could not apply countervailing duties in the circumstances presented. The issue was not unknown when the WTO Subsidies Agreement was negotiated. Even the EU State Aids Code has provisions in line with US practice. But thanks to the WTO Secretariat, a new international rule was added.

---

6. World Trade Organization, Report of the Panel, *United States—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R (Dec 23, 1999).

Other decisions are now emerging that continue this process of legislation by the WTO Secretariat. For instance, in *EU Bed Linens*,<sup>7</sup> the panel struck down the EU practice of "zeroing" out negative dumping margins for certain product models to ensure that the final overall dumping margin reflected the full amount of dumping targeted to certain other product models. This practice is necessary to remedy the full amount of dumping of the targeted products. The panel acknowledged that the text of the *Antidumping Agreement* did not explicitly prohibit this practice, yet concluded that the practice was nonetheless inconsistent with the *Antidumping Agreement*. This is an example of a WTO panel legislating to fill in the perceived gaps in the coverage of the *Antidumping Agreement*. It is a violation of the standard of review contained in the *Antidumping Agreement* that calls for deference to national administrators of antidumping laws.<sup>8</sup> The panelists are not to substitute their judgment for that of WTO Member trade officials.

In *Thailand-H-beams*,<sup>9</sup> the WTO panel faulted the Thai authority for failing to make specific findings on some of the fifteen injury factors listed in the *Antidumping Agreement*, demanding a "persuasive explanation" concerning how the evaluation of each factor led to the finding of injury. However, the list of factors in *Antidumping Code Article 3* was never intended to be treated this way. In a given case, two or three factors could so clearly demonstrate material injury that there would be no point in lingering on the other factors. Indeed, authorities are free to treat particular factors as more or less important than others. The panel's reasoning here, however, suggests that if any of the fifteen factors gives the appearance of healthy domestic industry, then the authority must rule for respondents (in other words, find no injury). This is not even a minimally reasonable way of interpreting the substantive provisions of the *Antidumping Agreement* or applying the required standard of review. Some of the panel's more flagrantly inventive legal interpretations have since been reversed by the Appellate Body.<sup>10</sup>

- 
7. World Trade Organization, Report of the Panel, *European Communities-Antidumping Duties on Imports of Cotton-Type Bed-Linen from India*, WT/DS141/R (Oct 30, 2000).
  8. *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, Art 17.6(i): "If the establishment of facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation should not be overturned."
  9. World Trade Organization, Report of the Panel, *Thailand-Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R (Sept 28, 2000).
  10. World Trade Organization, Report of the Appellate Body, *Thailand-Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/7 (Apr 11, 2001).

## C. INSTITUTIONAL ISSUES

There are three institutional issues that need to be addressed: competence, bias, and transparency.

*Competence.* Panelists are not clearly competent to address the issues with which they are presented. Little information is available about their qualifications. In some instances it is painfully apparent that they are wholly unsuited to the task.

*Bias.* There is no adequate process to guard against panelists' conflicts or biases. The most recent case in which I had a direct interest was ruled upon by a panel made up of trade officials from countries which were subject to identical trade cases involving identical products.

*Transparency.* The checks through public scrutiny on abuses that exist are absent in WTO dispute settlement as proceedings are conducted in secret, with those most affected by panel decisions wholly excluded. There is no excuse for conducting judicial proceedings, which panel hearings are supposed to be, *in camera*. (This should be distinguished from deliberations of the panelists, once they have heard argument, which can and should be conducted in private.)

## II. SUGGESTED SOLUTIONS

### A. IMPROVING THE CONDUCT OF TRADE RELATIONS AMONG NATIONS

#### 1. Wolff's Suggestions.

The steps are easy enough to state but will be difficult to accomplish. In each case, it is suggested that the attempt first be made between the United States and the EU, as these are the two largest entities engaged in world trade, and their relations have been particularly troubled.

*Start with a US-EU truce.* Lift all current trade sanctions, and withdraw threats of further trade sanctions. Injurious and unfair practices could still be offset, but attempts by one to gain an advantage over the other through WTO litigation would be curtailed. This will require fair compromises to be reached in all outstanding matters and withdrawal of all litigation that is not essential to the interests of the aggrieved party. (Most cases currently fall into this nonessential category.) Easier said than done, but not impossible.

*The US and EU should enter into a formal bilateral dispute settlement agreement with the EU providing for mandatory mediation by the WTO Director General if requested by either party.* Agree not to resort to WTO dispute settlement without intensive, and if necessary, extended good faith efforts at negotiating mutually acceptable outcomes. The consultative process has become pro-forma and has yielded little in the way of results in most disputes, as the parties have the sure knowledge that the problem will in any event in a very short time be before a panel for resolution. Masters appointed

by an independent WTO judiciary could engage in investigation and fact finding to resolve matters of fact.

*Agree that WTO panel findings will be deemed advisory only, and not automatically adopted by the Dispute Settlement Body ("DSB"), but will inform renewed good faith efforts at resolving matters through negotiation.* An advisory opinion on the WTO consistency of any measure would bolster the position of the party favored by it, without provoking the senseless rounds of retaliation and spite cases.

## 2. Barfield's Suggestions.

*Safety valve: Forced Conciliation, Mediation, and Voluntary Arbitration.* Where there is no established legislative rule governing an issue or where there is substantial ambiguity in the existing rules, it makes sense to provide a process which can make non-binding recommendations to the parties. Sovereign nations, however, cannot allow their interests to be subject to binding arbitration. No panel can be allowed to dictate an outcome that was not subject to a clear pre-existing obligation.

*Substitute compensation for retaliation.* WTO members are already permitted to offer additional trade liberalization as compensation in lieu of removing trade practice that a panel considers offensive. Unfortunately, compensation is rarely offered. This leaves the winning party with no option other than to retaliate. The alternative of levying fines should be explored, but the use should be selective—for example, for trade-related antitrust, labor, or environmental regulations governing actions by individual companies. General retaliation through the use of fines rather than traditional trade barriers will not improve international relations. And how will the monetary fine on the offending nation be imposed? General seizure of bank balances and other property? This well-intended suggestion could widen a trade dispute into general economic warfare, unless the fines are targeted very specifically against private behavior that violates international rules.

## B. CONSTITUTIONAL ISSUES—CURBING THE RUNAWAY WTO SECRETARIAT

### 1. Wolff's Suggestions.

*Create a standing judiciary.* How can matters of great importance continue to be entrusted to an adjudicatory system based notionally on part-time volunteers? It may seem counter-intuitive for those concerned with national sovereignty to contemplate creating a standing judiciary. However, the sovereignty issue could be resolved by making panel decisions advisory.

Problems of bias and conflicts would be dealt with more readily with a small group of standing judges. A standing judiciary could also develop doctrines necessary in any constitutional system to regulate the balance of powers among the various actors. It is essential that the doctrine of judicial restraint (resisting the urge to



legislate) be self-imposed by the judges or imposed by the WTO Members on the panel process.

In addition, it is important to staff the judicial panels with independent clerks who are not part of the regular WTO bureaucracy.

*Explicitly provide for a third option.* In normal cases (namely, cases alleging actual violations, as opposed to those alleging non-violation "nullification or impairment"), panels would be directed to conclude that: (1) there was a violation of obligations; (2) there was no violation; or (3) the rules were ambiguous or did not explicitly cover the complained of conduct. The existing WTO Dispute Settlement Understanding does allow this to take place. It might help panels improve decisionmaking if there were another formal statement from the WTO Members in the Dispute Settlement Understanding that not all matters are covered and the panels are not to invent new rights and obligations for WTO Members.

## 2. Barfield's Suggestions.

*A blocking minority.* Barfield seeks to restore balance in the system by allowing one-third of the WTO Members to block a panel decision. If implemented, this should be accomplished on the basis of a vote weighted by share of world imports, just as the International Monetary Fund has voting weighted by financial contribution.

Nevertheless, there will be problems. Developing countries will find the system discriminatory. So should others: are the fruits of a panel win to be spoiled by a group of nations with similar interests that are adverse to the plaintiff, for example, agricultural protection, or selective and trade-diverting regional liberalization? In effect, one-third of the WTO Membership would be allowed to alter the negotiated rules.

Again, the problem of legislation by WTO panels can be addressed by making the panel decisions advisory.

*Direct effect.* I agree that trade agreements should continue to have no direct legal effect within the US, but I would go further. Congress should mandate that even in areas where agencies enjoy discretion, administrative practice may not be changed to conform to WTO panel rulings without implementing action by Congress. This concept may have to be articulated rather clearly and forcefully to overcome the judicial doctrines, developed long ago with other kinds of international norms in mind, that a US statute "ought never to be construed to violate the law of nations, if any other possible construction remains."<sup>11</sup>

As Barfield says, "It is imperative that national legislatures, including the US Congress, exert greater vigilance in retaining the final determination over the content

---

11. *Federal Mogul Corp v United States*, 63 F3d 1572, 1581 (Fed Cir 1995), citing *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64, 188 (1804).

of these core elements of domestic regulation."<sup>12</sup> How the Congress should exercise this responsibility should become the urgent subject of consideration as part of the "trade promotion authority" (formerly "fast track") debate.

*Creation of a bipartisan commission established by Congress to report on the implications of the WTO dispute settlement system for the US constitutional system and on US laws and regulations.* This is a good idea. It, or some other independent standing body, should review and render opinions to the Congress on the implications of individual panel decisions. Senators Dole and Moynihan advanced an idea along these lines, recommending the creation of a Commission made up of retired Federal judges.

*Establish a permanent joint committee of Congress to provide continuing oversight and analysis of rules passed by international bodies that have an impact on US domestic laws.* This is unlikely to occur, but greater attention needs to be paid to these questions, and consideration of a proposal of this kind might yield some more effective oversight procedures by committees with jurisdiction.

### C. INSTITUTIONAL ISSUES

*Grant public access to dispute settlement proceedings.* Sensible, essential, currently non-negotiable. This will take a concerted effort by all those—Americans and others—who see merit in this proposal.

*Amicus briefs.* Barfield would ban them. I would insist on them. Where there is adjudication, there is no reason not to give a panel the benefit of all learning, subject to some discretion as to length, degree of interest, and the like. Courts are used to being selective and putting good arguments and solid facts to use.

*Expert panelists.* Barfield would bring in experts as panel members when non-commercial subjects like the environment are addressed. I would make expertise available to any panel, but not make experts panelists. The WTO's only justification for its existence is to review trade-related aspects of national measures. If there are environmental issues that have to be settled that are not primarily trade issues, they should be addressed elsewhere. Judges should be experts in the WTO rules and need not be experts in the natural or social sciences.

*Public hearings during mediation, conciliation.* Barfield would allow the Director General to take testimony in public hearings from private parties, if the WTO Members that are parties to the dispute concur. This is an interesting idea to get direct testimony from those who are not government officials.

*Seminars with NGOs conducted by the Director General.* The question for the NGO participants will be the extent to which they will feel that this allows meaningful input.

---

12. Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 Chi J Int'l L 403, 412 (2001).

### III. CONCLUSIONS

Litigation is not a satisfactory alternative as a general matter to the conduct of commercial diplomacy by trading nations. Many now agree that large, politically charged cases ought not to be settled by litigation. The first solution should not be to attempt to resolve the largest trading differences among nations by adjudication.

The second problem addressed here—that of panels legislating, going where WTO Members' negotiators could not or would not go—is equally important. Serious questions of fairness as well as the legitimacy of the WTO are being raised about WTO dispute settlement. National sovereignty is being eroded where panels create new rights and obligations on issues to which the parties to an agreement did not explicitly bind themselves.

The case for specific reforms is clear. To the extent that there is a litigation option, the litigation must be handled professionally. The legal machinery must be well constituted, effective, and impartial. The WTO's judges and staff should receive due credit for the honor, probity and fairness with which they decide cases. Open procedures should help create and then reinforce a positive reputation for WTO dispute settlement.

WTO dispute settlement urgently requires change and reform before more damage is done. Many of the changes can be achieved through bilateral agreements entered into by the United States and its trading partners. Some of the changes will have to await systemic reforms achieved in multilateral negotiations. But it would be dangerous to wait too long.